(19,132.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 481.

ORMOND G. SMITH, GEORGE C. SMITH, AND CORA A. GOULD, COMPOSING THE FIRM OF STREET & SMITH, APPELLANTS,

vs.

HENRY C. PAYNE, POSTMASTER GENERAL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of the District of Columbia	1	1
Caption	1	1
Bill of complaint	1	1
Restraining order	11	11
Restraining order rescinded	11	11
Answer	12	12
Preliminary injunction denied and rule discharged	25	25
Replication	26	25
Stipulation as to reference to books, &c	26	26
Decree, appeal, and penalty of bond fixed	27	26
Memorandum as to deposit in lieu of appeal bond	27	27
Clerk's certificate	27	27
Stipulation to dispense with printing exhibits	28	27
Stipulation to submit	29	28
Order of submission	30	28
Opinion	31	29
Decree	32	29
Order allowing appeal	33	29
Citation and service	34	30
Clerk's certificate	35	30

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1903.

1 In the Court of Appeals of the District of Columbia.

ORMOND G. SMITH ET AL., Appellants,
vs.
HENRY C. PAYNE, Postmaster General. } No. 1354.

Supreme Court of the District of Columbia.

ORMOND G. SMITH, GEORGE C. SMITH, and Cora A. Gould, Composing the Firm of Street & Smith, Complainants,
vs.
HENRY C. PAYNE, Postmaster General. Defendant. } No. 23996. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

Petition for Injunction.

Filed June 3, 1903.

Supreme Court of the District of Columbia.

ORMOND G. SMITH, GEORGE C. SMITH, and Cora A. Gould, Composing the Firm of Street & Smith,
against
HENRY C. PAYNE, Postmaster General. } Equity. No. 23996, Docket 53.

To the honorable the supreme court of the District of Columbia, sitting in equity:

Ormond G. Smith, George C. Smith and Cora A. Gould, all of the city of New York and State of New York, bring this their bill of complaint against Henry C. Payne, Postmaster General of the United States.

2 And your orators complaining say:

First. That your orators are each citizens of the United States.

Second. That the respondent is a citizen of the United States, and is Postmaster General of the United States.

Third. That during the times hereinafter mentioned your orators were, and still are co-partners, and engaged, as such co-partners, in the publishing business under the firm name or style of Street & Smith, and had and still have a place of business in the city of New York, borough of Manhattan.

Fourth. That your orators have been for more than four years last past and are now the publishers of a periodical publication entitled "The Magnet Detective Library."

Fifth. That said publication was commenced on September 1, 1897, and has ever since its date been regularly issued every week, and from a known office of publication, to wit, the said place of business of your orators; that said periodical publication during the whole time that the same has been published, and each issue of the same have been exclusively in print without addition by writing, mark or sign, and have borne a date of issue, and all of said issues thereof have been numbered consecutively.

That each and every of the issues of said publication have been formed and composed of printed paper sheets without board, cloth, leather or other substantial binding, such as distinguished printed books for preservation from periodical publications.

That said publication and each issue thereof was originated and published for the dissemination of information of a public character and was devoted to literature.

That neither said publication nor any issue thereof was or is designed primarily for advertising purposes or for free circulation at nominal rates.

That said publication now has, and throughout the entire time of its publication has had a legitimate list of subscribers.

That the literary contents of said periodical publication are made up as follows:

Each issue contains high-class fiction of great literary merit, such as "The Sherlock Holmes Detective Stories," by A. Conan Doyle, "An Accidental Password," by Nicholas Carter, and "The Clique of Gold," by Emile Gaboriau, and your orators file herewith copies of said publications, which, in respect to the requirements of mailable matter of the second class, are similar to each and every other of said publications, entitled "The Magnet Detective Library."

That your orators heretofore and on or about the 1st day of September, 1897, duly made and filed their affidavit as to the character of said publication, and as to all matters required by the Post Office Department of the United States, as a preliminary to entering such periodical as second-class mail matter.

That said Post Office Department thereupon on or about the 4th day of September, 1897, admitted said periodical publication to the privilege of second-class mail matter, and that thereafter and
3 until about the 4th day of November, 1901, the said publication was carried in the United States mails at second class rates, the certificate admitting said periodical publication to said privilege being as follows:

(3505.)

Certificate of Entry of Publication as Second-class Matter.

5079.

POST OFFICE AT NEW YORK, N. Y., *Sept.* 4, 1897.

I hereby certify that the Magnet Detective Library a monthly published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it, as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

C. VAN COTT, *Postmaster,*
Per ESPOST, *2nd Ass't P. M.*

5–280.

Sixth. That on or about the 4th day of November, 1901, your orators received the following notice:

Indexed ——.

Post office, New York, N. Y., office of the postmaster.

NOVEMBER 4TH, 1901.

Messrs. Street and Smith, publisher- "Magnet Library," 238 William street, New York, N. Y.

GENTLEMEN: I am directed by the Hon. Third Assistant Postmaster General to inform you that the certificate of entry as second-class matter of "Magnet Library" is cancelled, and hereafter it will be unlawful to print a statement on the publication that it is so entered; and when offered for mailing in the future, whether by the publisher, news agent, or others, it will be subject to the third-class rate of postage, one cent for each two ounces or fraction thereof, prepaid by stamps affixed.

Very respectfully,

C. VAN COTT,
Postmaster,
Per E. S. POST,
Act'g Ass't P. M.

Seventh. That thereupon and up to the present time said respondent has refused and still continues to refuse to admit to or carry in the United States mails said periodical publication and the different issues of the same at said second-class rates, but since then has demanded and still continues to demand postage upon said periodical publication and the different issues thereof at third-class rates.

4 Eighth. That said cancellation of said certificate of entry giving to your orators, permission to mail said publication at

second-class rates, was unlawful, and that the action of the Postmaster General in excluding said publication from the mails and denying to them the privilege of being carried in the United States mails at second-class rates, as aforesaid, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office, in regard to this class of publications and similar publications, for an unbroken period of sixteen years, and that said right so accorded to your orators by said certificate of entry as aforesaid, is a valuable property right, and such exclusion of said publication from the mails at second-class rates, and the exaction of third-class rates therefor, has caused, is now causing and will continue to cause your orators great pecuniary loss and damages, both on account of the higher rate of postage so exacted and by reason of the additional expense necessarily incurred in the change of method of distribution of said publication, all of which additional outlay and expense will have to be borne by your orators, as they will be unable to increase the prices for which said publications are now sold.

Ninth. And your orators further show that they have been for more than four years last past and are now the publishers of a periodical publication entitled "The Arrow Library."

Tenth. That said publication was commenced on October 1st, 1876, and has ever since its date been issued regularly every week, and from a known office of publication, to wit, the said place of business of your orators; that said periodical publication during the whole time that the same has been published, and each issue of the same, have been exclusively in print, without addition by writing, mark or sign, and have borne a date of issue, and all of said issues thereof have been numbered consecutively.

That each and every of the issues of said publication have been formed and composed of printed paper sheets without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

That said publication and each issue thereof was originated and published for the dissemination of information of a public character and was devoted to literature.

That neither said publication, nor any issue thereof, was or is designed primarily for advertising purposes or for free circulation or circulation at nominal rates.

That said publication now has, and throughout the entire time of its publication has had a legitimate list of subscribers.

That the literary contents of said periodical publication are made up as follows:

Each issue contains high-class fiction of great literary merit, such as "Jane Eyre" by Charlotte Bronte, "Lorna Doone" by R. D. Blackmore, and the "The Bondman" by Hall Caine.

That your orators heretofore and on or about the 1st day of October, 1897, duly made and filed their affidavit as to the character of said publication and as to all matters required by the Post Office Department of the United States, as a preliminary to entering such periodical as second-class mail matter.

That said Post Office Department thereupon on or about the 21st day of October, 1897, admitted said periodical publication to the privilege of second-class mail matter, and that thereafter and until about the 4th day of November, 1901, the said publication was carried in the United States mails at second-class rates, the certificate admitting said periodical publication to said privilege being in substantially the same form as that admitting said "The Magnet Detective Library" to said privilege.

Eleventh. That on or about the fourth day of November, 1901, your orators received from the postmaster of the city of New York a notice of the cancellation of said privilege in substantially the same form as said notice of cancellation of said privilege to said "The Magnet Detective Library."

That thereupon and up to the present time said respondent has refused and still continues to refuse to admit to or carry in the United States mails said "Arrow Library" and the different issues of the same at said second-class rates, but since then has demanded and still continues to demand postage upon said periodical publication and the different issues thereof at third-class rates.

Twelfth. That said cancellation of said certificate of entry giving to your orators, permission to mail said publication at second-class rates, was unlawful, and that the action of the Postmaster-General in excluding said publication from the mails and denying to them the privilege of being carried in the United States mails at second-class rates, as aforesaid, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office, in regard to this class of publications and similar publications, for an unbroken period of sixteen years, and that said right so accorded to your orators by said certificate of entry, as aforesaid, is a valuable property right, and such exclusion of said publication from the mails at second-class rates, and the exaction of third-class rates therefor, has caused, is now causing and will continue to cause your orators great pecuniary loss and damages, both on account of the higher rates of postage so exacted and by reason of the additional expense necessarily incurred in the change of method of distribution of said publication, all of which additional outlay and expense will have to be borne by your orators, as they will be unable to increase the prices for which said publications are now sold.

Thirteenth. That your orators have been for more than four years last past and are now the publishers of a periodical publication entitled "The Columbia Library."

That said publication was commenced on September 1st, 1898, and has ever since its date been regularly issued every week, and from a known office of publication to wit, the said place of business of your orators, that said periodical publication during the whole time that the same has been published, and each issue of the same has been exclusively in print, without addition by writing,
6 mark or sign, and have borne a date of issue, and all of said issues thereof have been numbered consecutively.

That each and every of the issues of said publication have been

formed and composed of printed paper sheets without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

That said publication and each issue *issue* thereof was originated and published for the dissemination of information of a public character and was devoted to literature.

That neither said publication nor any issue thereof was or is designed primarily for advertising purposes or for free circulation or circulation at nominal rates.

That each publication now has, and throughout the entire time has had a legitimate list of subscribers.

That the literary contents of said periodical publication are made up as follows:

Each issue contains high-class fiction of great literary merit, such as "Madam Midas," by Fergus Hume; "King Solomon's Mines," by H. Rider Haggard, and "A Strange Secret," by Sylvannus Cobb, Jr.

That your orators heretofore and on or about the 1st day of September, 1898, duly made and filed their affidavit as to the character of said publication, and as to all matters required by the Post Office Department of the United States, as a preliminary to entering such periodical as second-class mail matter.

That said Post Office Department thereupon on or about the 26th day of August, 1898, admitted said periodical publication to the privilege of second-class mail matter, and that thereafter and until about the 4th day of November, 1901, the said publication was carried in the United States mails at second-class rates, the certificate admitting said periodical publication to said privilege being in substantially the same form as that admitting said "The Magnet Detective Library" to said privilege.

Fourteenth. That on or about the fourth day of November, 1901, your orators received from the postmaster of the city of New York, a notice of the cancellation of said privilege in substantially the same form as said notice of cancellation of said privilege to said "The Magnet Detective Library."

Fifteenth. That thereupon and up to the present time the said respondent has refused and still continues to refuse, to admit to or carry in the United States mails such periodical publication and the different issues of the same at said second-class rates, but since then has demanded and still continues to demand postage upon said periodical publication and the different issues thereof at third-class rates.

Sixteenth. That said cancellation of said certificate of entry giving to your orators, permission to mail said publication at second-class rates, was unlawful, and that the action of the Postmaster General in excluding said publications from the mails and denying to them the privilege of being carried in the United States mails at
7 second-class rates, as aforesaid, is a reversal of and contrary to the practice sanctioned by him and his predecessor in office, in regard to this class of publications and similar publications

for an unbroken period of sixteen years, and that said right so accorded to your orators by said certificate of entry, as aforesaid, is a valuable property right, and such exclusion of said publications from the mails at second-class rates, and the exaction of third-class rates therefor, has caused, is now causing and will continue to cause your orators great pecuniary loss and damages, both on account of the higher rate of postage so exacted and by reason of the additional expense necessarily incurred in the change of method of distribution of said publications all of which additional outlay and expense will have to be borne by your orators, as they will be unable to increase the prices for which said publications are now sold.

Seventeenth. That your orators have been for more than four years last past and now are the publishers of certain periodical publications entitled as follows:

"The Undine Library," "The Medal Library," "The Eagle Library," "The Bertha Clay Library," "The Diamond Handbook Series" and "The Eden Series."

Eighteenth. That the publication of said periodical publications was commenced as follows:

Of "The Undine Library" on October 1, 1899.

Of "The Medal Library" on January 28, 1899.

Of "The Eagle Series" on March 1, 1897.

Of "The Bertha Clay Library" on June 18, 1900.

Of "The Diamond Handbook Series," on February 14, 1901, and of "The Eden Series" on January 5, 1901; and each of them has ever since its date been regularly issued respectively as follows: Said "The Undine Library," monthly; said "The Medal Library," weekly; said "The Eagle Series weekly;" said "The Bertha Clay Library," semi-weekly; said "The Diamond Handbook Series," semi-monthly, and said "The Eden Series," weekly, and that each of them has been so issued from a known office of publication, to wit, the said place of business of your orators; that each of said periodical publications during the whole time that the same has been published, and each issue of each of the same has been exclusively in print, without addition by writing, mark or sign, and have borne a date of issue, and all of said respective issues thereof have been numbered consecutively.

That each and every of the respective issues of each of said publications have been formed and composed of printed paper sheets without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

That each of said publications and each of the respective issues thereof were originated and published for the dissemination of information of a public character and were devoted to literature.

That none of said publications, nor any of the respective
8 issues thereof, was or is designed primarily for advertising purposes or for free circulation or circulation at nominal rates.

That each of said publications now has, and throughout the entire time of its publication has had a legitimate list of subscribers.

That the literary contents of said periodical publications are made up as follows:

Each issue of said "The Undine Library" contains high-class fiction of great literary merit, such as "Hermina Suydam," by Gertrude Atherton; "Uncle Ep. Miller, the Horse Trader," by Wm. C. Hudson, and "The Philosopher of Driftwood," by Annie Jenness Miller; and each issue of said "The Medal Library" contains fiction of like character, such as "For Name and Fame," by G. A. Henty; "Tom Brace," by Horatio Alger, Jr., and "The Perils of the Jungle," by Edward S. Ellis; and each issue of said "The Bertha Clay Library," similar fiction, such as Bertha M. Clay's "In Love's Crucible," "A Heart's Idol," and "The Gypsy's Daughter," and each issue of said "The Eagle Series" similar fiction, such as, "For Love and Honor," by Effie Adelaide Rowlands, "Geoffrey's Victory" by Mrs. Georgie Sheldon, and "Miss Fairfax of Virginia," by St. George Rathbone; and each issue of said "The Eden Series" similar fiction, such as "Only a Clod," by Miss M. E. Braddon, and "The Three Sisters," and "Ishmael," by Mrs. Southworth; and each of said "The Diamond Handbook Series" similar fiction of literary composition, such as "The Zingara Fortune Teller," "Physical Health Culture," by Professor Fourmen, and "Twentieth Century Writer," by L. W. Sheldon.

That your orators heretofore and on or about the 1st day of October 1899, and on or about the 28th day of January, 1899, and on or about the 1st day of March, 1897, and on or about the 18th day of June, 1900, and on or about the 14th day of February, 1901, and on, or about the 5th day of January, 1901, duly made and filed their affidavits as to the character of said "The Undine Library," said "The Medal Library," said "The Eagle Series," said "The Bertha Clay Library," said "The Diamond Handbook Series," and the said "Eden Series," respectively, and as to all matters required by the Post Office Department of the United States, as a preliminary to entering each of such periodicals as second class mail matter.

That said Post Office Department thereupon on or about the 27th day of October, 1899, and on or about the 15th day of June, 1899, and on or about the 9th day of March, 1897, and on or about the 28th day of July, 1900, and on or about the 11th day of March, 1901, and on or about the 18th day of January, 1901, respectively admitted said publications, to wit, said "The Undine Library," said "The Medal Library," said "The Eagle Series," said "The Bertha Clay Library," said "The Diamond Handbook Series," and said "The Eden Series" respectively to the privilege of second-class mail matter, and that thereafter and until about the 4th day of November, 1901, each of said publications was carried in the United States mails at second-class rates, each of said respective certificates
9 admitting said periodical publications to said privilege being in substantially the same form as the certificate admitting said "The Magnet Detective Library" to said privilege.

Nineteenth. That on or about the 4th day of November, 1901, your orators received from the postmaster of the city of New York, notices of the cancellation of said privileges in substantially the same form as said notice of cancellation of said privilege to said "The Magnet Detective Library."

That thereupon and up to the present time said respondent has refused and still continues to refuse to admit to or carry in the United States mails said periodical publications and the different issues of the same at said second-class rates, but since then has demanded and still continues to demand postage upon each of said periodical publications, and upon each of the different issues thereof at third-class rates.

Twentieth. That said cancellation of said certificates of entry giving to your orators permission to mail said publications at second class rates, was unlawful, and that the action of the Postmaster-General in excluding said publications from the mails and denying to them the privilege of being carried in the United States mails at second-class rates, as aforesaid, is a reversal of and contrary to the practice sanctioned by him and his predecessors in office, in regard to this class of publications and similar publications, for an unbroken period of sixteen years, and that said right so accorded to your orators by said certificates of entry as aforesaid, is a valuable property right; and such exclusion of said publications from the mails, at second-class rates, and the exaction of third-class rates thereof, has caused, is now causing, and will continue to cause your orators great pecuniary loss and damage, both on account of the higher rate of postage so exacted and by reason of the additional expense necessarily incurred in the change of method of distribution of said publications, all of which additional outlay and expense will have to be borne by your orators, as they will be unable to increase the prices for which said publications are now sold.

Twenty-first. That the value of said property rights so accorded to your orators by said certificates of entry as aforesaid, exceeds in value the sum of one hundred thousand dollars.

Twenty-second. And your orators, in the publication and issue of these publications have complied with all the terms, conditions and requirements of the laws of the United States relating to mailable matter of the second-class; and your orators file herewith, copies of each and every of said publications hereinbefore mentioned, which, in regard to the requirements of mailable matter of the second class, are similar to each and every other of said publications.

Twenty-third. And your orators show further that they have no plain, sufficient, adequate and complete remedy at law; and any relief at law could only be obtained by a multiplicity of suits, which would put your orators to great vexation and expense, and, therefore, your orators pray

10 1. That your orators may be declared to be entitled to have each and every of said publications entered, received and transmitted through the mails of the United States, at second

class rates, and as mailable matter at such rates as prescribed by the act of Congress approved March 3, 1879.

2. That it may please this honorable court to issue an injunction restraining the respondent, his agents and subordinates from enforcing the cancellation of said several certificates of entry hereinbefore respectively set forth, and requiring said respondent to receive each and every of said publications for transmission, and to transmit the same through said mails as mailable matter of the second class, and at second-class rates, in accordance with the provisions of said act of Congress.

3. And your orators pray also, for a preliminary injunction and that your honors will grant a writ of subpœna directed to said respondent requiring him to answer this bill, but not under oath, his oath being hereby expressly waived, and show cause why the prayers of this bill should not be granted.

4. And that your orators may have such other and further relief as under the facts stated, and in the premises, and in equity they may show themselves entitled and may seem meet and proper.

ORMOND G. SMITH.
GEO. C. SMITH.
CORA A. GOULD.

TRACY L. JEFFORDS,
MOODY & GETTY,
Att'ys for Complainants, 206 *Broadway*,
Borough of Manhattan, N. Y. City.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, } ss:

On this 22nd day of May, 1903, before me personally came Ormond G. Smith, who, being by me duly sworn did depose and say that he is one of the complainants above named; that he has read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true, except as to the matters therein stated to be alleged on information and belief, and as to such matters he believes it to be true.

ORMOND G. SMITH.

Sworn to and subscribed before me this 22d day of May, 1903.

E. F. EILERT,
[SEAL.] *Notary Public* (14), *New York County, N. Y.*

STATE OF NEW YORK,
County of New York, } ss:

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same
11 being a court of record, do hereby certify, that E. F. Eilert, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in

said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of the said court and county, the 25th day of May, 1903.

THOS. L. HAMILTON, *Clerk.*

Filed June 3, 1903.

Restraining Order.

Upon the complainant filing undertaking as required by equity rule 42.

The defendant is hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 19th day of June, 1903, of which take notice.

By the court:

THOS. H. ANDERSON, *Justice.*

Order Rescinding Restraining Order.

Filed June 5, 1903.

In the Supreme Court of the District of Columbia.

ORMOND G. SMITH ET AL.
vs.
HENRY C. PAYNE, Postmaster General. } Equity. 23996.

Upon consideration of the petition heretofore filed herein it is by the court this 5th day of June, 1903:

Ordered that the restraining order heretofore issued on June 3rd, 1903 be and the same is hereby rescinded.

And it is further ordered that the defendant herein, Henry C. Payne, Postmaster General, be and he is hereby required to show cause on June 15th, 1903, at 10 o'clock a. m., why an injunction should not be granted as prayed in the petition herein and the other relief therein asked for should not be granted; provided a copy of this order be served on said defendant not later than June 6th, 1903 and a copy of the original bill be furnished to counsel for defendant, not later than Monday, June 8th, 1903:

THOS. H. ANDERSON, *Justice.*

12 *Marshal's Return.*

Served copy of within order on defendant personally, June 5, 1903.

AULICK PALMER, *Marshal.*
B.

Answer of Defendant.

Filed June 15, 1903.

In the Supreme Court of the District of Columbia.

ORMOND G. SMITH, GEORGE C. SMITH, and Cora Gould, Composing the Firm of Street & Smith, Complainants,
vs.
HENRY C. PAYNE, Postmaster-General, Defendant.
} Equity. No. 23996, Docket 53.

The defendant now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception that may be taken to the said bill for the many errors, uncertainties and imperfections thereof, for answer thereto, or to so much thereof as he is advised that it is necessary or material for him to make answer unto, answering says:

1, 2, 3. The defendant admits the allegations of the first, second and third paragraphs.

4. The defendant admits that the complainants for more than four years last past have published books under the designation "The Magnet Detective Library;" but he denies that such books so published are a periodical publication.

5. The defendant admits that the publication of such books was commenced on September 1, 1897, and, for anything that the defendant knows to the contrary, such books have been regularly issued every week since that date. He admits that such books have been issued from a known office of publication, to-wit: the place of business of the complainants, and that such books and each and every one thereof have been exclusively in print without addition of writing, mark or sign; and that a date of issue has been printed upon each one thereof; and that all of said books have been numbered consecutively. He admits that each and every of said books printed under the designation aforesaid have been formed and composed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguished printed books for preservation from periodical publications.

13 While it may be true that each of said books may be a work of literature itself, the defendant denies that in any proper or legal sense each of said books is devoted to literature.

For anything that this defendant knows to the contrary, none of said books so issued was or is designed primarily for advertising purposes or for free circulation at nominal rates.

The defendant has not had occasion to inquire officially and does not know of his own knowledge and therefore can neither admit nor deny that the said "The Magnet Detective Library," published by the complainants, now has or has had a legitimate list of subscribers, but the defendant is informed and believes and avers that the several books published under the collective name of "The Magnet Detective Library," are not sent through the mails to individual subscribers by the publishers thereof, but that all or a greater part of the copies of each one of said books so issued are turned over to a news agency or company and by it distributed through the mails or otherwise, to other booksellers and agents and by them sold over the counter singly as separate and independent books.

The defendant admits that the contents of each one of said books is made up of fiction, as to the literary merit of which, however, this defendant is not able to answer. But the defendant avers that each of the so-called numbers or issues of "The Magnet Detective Library" is a complete independent work and is in fact a book; that such so-called issues or numbers have no true relation or connection one with another and are not parts of a periodical publication and do not constitute a periodical publication, and in support of his allegation in this behalf the defendant refers to a copy of one of said publications "The Queen of Knaves"—annexed as Exhibit No. 1.

The defendant admits that the complainants on or about September 1, 1897, made and filed an affidavit as to the character of said publications and as to the matters required by the Post Office Department of the United States preliminary to the admission of such of the said "The Magnet Detective Library" to the mails as second class matter. It is true that the Post Office Department on or about September 1, 1897, admitted the said "The Magnet Detective Library" to the privileges of the second class of mail matter, and thereafter, and until about November 4, 1901, the several books so published were carried in the United States mails at second class rates. And the defendant admits that the copy of the certificate of entry issued on September 4, 1897, set forth in complainants' bill, is a true copy of such certificate.

6. In answer to paragraph 6, the defendant says that, in pursuance of the power and duty imposed upon his predecessor by law as Postmaster General for the time being, the said Postmaster General did, on or about September 30, 1901, cause the postmaster at the city of New York to notify the complainants that the Post Office Department would afford them an opportunity to show cause why
14 the publication designated as "The Magnet Detective Library" should not be excluded from the second class rates of postage on the ground that they have the characteristics of books.

That in response to such notice to show cause, the complainants submitted arguments, statements and evidence for the purpose of

establishing that such publications were properly admissible to the second class of mail matter. That said arguments, statements and evidence were duly examined and considered by the Postmaster General, acting through the Third Assistant Postmaster General in that behalf, and that as a result of such examination and consideration, the Postmaster General, acting through the Third Assistant Postmaster General in that behalf, found and determined that the publications issued by the complainants under the name of the said "The Magnet Detective Library" had not the characteristics of and were not in fact mailable matter of the second class under the provisions of the act of March 3, 1879, but on the contrary had the characteristics of and were in fact mailable matter of the third class, to-wit: books.

And thereupon the Third Assistant Postmaster General, acting for the Postmaster General in that behalf, under date of November 2, 1901, notified the postmaster at New York of the finding and determination aforesaid, and directed the said postmaster to cancel the certificate of entry of the "Magnet Detective Library" and to advise the publisher thereof that thereafter it would be unlawful to print on such publications a statement of entry to the second class, and that when offered for mailing in the future whether by the publisher, news agent or others, such publications would be subject to the third-class rate of postage—one cent for each two ounces or fraction thereof, prepaid by stamps affixed.

And thereupon the postmaster at New York addressed to the complainants the letter of November 4, 1901, set out in the sixth paragraph of the complainants' bill.

7. The defendant admits the allegations of the seventh paragraph.

8. In answer to the eighth paragraph, the defendant admits that his action of his predecessor in excluding books published under the designation of the "Magnet Detective Library" from the privileges of the second class rates of postage was contrary to the practice of such of his predecessors as admitted such publications or similar publications under the same general name to the privileges of the second class rates. But the defendant denies that such action is contrary to the practice sanctioned by himself in regard to the said publications or similar publications for any period of time whatever.

The defendant further says that the admission and transmission of mailable matter at the rates and under the terms prescribed by the statutes of the United States is a continuing administrative act and duty, the performance of which is devolved by law upon the Postmaster General for the time being, and that the defendant, as Postmaster General for the time being, in the performance of this duty is in no wise bound or controlled by the action of his predecessors, nor does the admission and transmission by one Post-
15 master General of mailable matter of a certain description at the second or any other particular rate constitute any obligation, contractual or otherwise, upon the United States or its officers

thereafter to admit publications of the same or like character or published under the same name, to transportation at the same rate.

The defendant denies that the privilege of having publications which comply with the requirements as to second class matter transmitted at the second class rate is a property right, and avers that whether publications do so comply with such requirements is a matter wholly within the competence and jurisdiction of the Postmaster General for the time being, and the determination of which is within the judgment and discretion of that officer.

The defendant is unable to admit or deny whether the complainants have been put to greater expense by reason of the higher rate of postage demanded for the transportation of the books issued under the name of the "Magnet Detective Library," or by reason of additional expenses incurred in the change of the method of distribution of said publication. He avers, hower, that the only effect, in contemplation of law, arising from his determination of the true character of said publications is that, if the same have at any time since the said fourth day of November, 1901, been offered for transmission in the mails, postage thereon has been demanded at the third class, instead of the second class, rate.

9. It is true that the complainants have been, and, so far as this defendant is informed, are now the publishers of certain publications designated "The Arrow Library." The defendant denies, however, that the said publications have been or are a periodical publication, and avers, on the contrary, that they have been and are now books.

10. He admits that the issuance of the books published by the complainants to which the collective name or title of "The Arrow Library" has been applied, was commenced on or about October 1, 1897; that one or more of such books has been issued, for aught anything this defendant knows to the contrary, about once a week since said date. He admits that such books have been issued from a known office of publication, to wit: the office of the complainants, and that such books and each of them have been exclusively in print, without addition of writing, mark or sign.

The defendant admits that it was the practice of the complainants to print in minute type in an unusual place on the back of the cover of each of said books in a manner calculated to escape the notice of the purchasing public, a suppose- date of issue. The defendant avers, however, that the printing of such date is a mere artificial and formal compliance with the statutory requirement to that effect, intended to disguise the true character of each of said publications, which is that of a separate and independent work, and in aid of the original purpose to simulate, for the purposes of postal rates, a periodical publication.

The defendant admits that each of the several books issued under the collective title of "The Arrow Library" has been num-
16 bered consecutively. The defendant admits that each of the said books so issued by the complainants has been formed of printed paper sheets, without board, cloth, leather or other substantial binding such as distinguish printed books from periodical pub-

lications. Defendant denies that said publication was originated or published for the dissemination of information of a public character, and, while admitting that each so-called issue, which is a complete and independent work, may be literature in itself, denies that the said publications are devoted to literature within the meaning of the act of March 3, 1879.

Defendant admits that said publications, for aught anything this defendant knows to the contrary, has not been designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

The defendant does not know of his own knowledge, and, therefore, can neither admit nor deny that the said "Arrow Library" has a legitimate list of subscribers, but the defendant is informed and believes and avers that none of the several books or novels published under that designation are sent through the mails to individuals who subscribe for such library, for a definite period of time, but that all, or practically all, the copies of each one of the several books so published are turned over by the complainants to a book dealer or news agent, who distributes them to other agents, who in turn sell them as books singly and without relation to the other books or novels published under the designation of such library. And the defendant says that, by reason of the manifest character of these publications, as hereinafter set forth, whereby it became and was evident that, being books, and not a periodical publication, they were not admissible to the second class, he was not, nor was his predecessor in office ever called upon or required officially to determine whether or not the supposed periodical known as "The Arrow Library" had a legitimate list of subscribers; and he further submits that if the supposed right of the complainants to transmission of the publications designated as "The Arrow Library" is in anywise dependent upon the existence of a legitimate list of subscribers, that is a matter of fact for the cognizance of the Postmaster-General.

The defendant admits that each so-called issue or number of "The Arrow Library" consists of a work of fiction, the literary merit of which the defendant submits he is not called upon either to admit or deny.

And the defendant further says that each of the so-called issues or numbers is not an issue or a number of a periodical publication, but is a separate and distinct book, complete and independent in itself; that the so-called issues have no true relation or connection one with another; that the only connection between the successive books issued under this name consists in the mere fact that over the title of the particular book there is printed on the cover thereof the words "Arrow Library," and that such books are numbered consecutively as they may appear. He further avers that said books
17 are sold separately as books complete in themselves, and that the title "Arrow Library" and the consecutive numbering are a mere device by means whereof the complainants have endeavored to give to a varied succession of distinct and independent novels the

appearance of a periodical publication. And the defendant further avers that, stripped of its cover, no mark or sign or designation of any of the so-called issues as a periodical appears thereon. And the defendant says that the publication issued by the complainants and marked on the cover with the designation "Arrow Library" are books and mailable matter of the third class. And the defendant craves leave to refer to one of the said publications filed herewith as Exhibit No. 2—A Country Gentleman, by Mrs. Oliphant.

The defendant admits the remaining allegations of the tenth paragraph as to the application for entry and the certificate issued thereon and the subsequent transmission of such publications.

11. For answer to the eleventh paragraph, the defendant says that his predecessor in office, in pursuance of his power and duty in that behalf, did, on September 28, 1901, cause the postmaster at New York to notify the complainants that the Post Office Department would afford them an opportunity to show cause why the publications designated as the "Arrow Library" should not be excluded from the second class rates of postage on the ground that they had the characteristics of books; that arguments, statements and evidence were submitted by said publishers in response to such notice and were duly examined and considered by the Postmaster General, acting through the Third Assistant Postmaster General in that behalf, who thereupon held and determined that the said publications had not the characteristics of, and were not, in fact, a periodical publication and mailable matter of the second class but had the characteristics of and were in fact books and mailable matter of the third class, and thereupon caused the postmaster at New York to inform the complainants that thereafter such publications, when offered for mailing, would be subject to the third class rate of postage, substantially as set forth in the complainants' bill.

12. For answer to the twelfth paragraph, the defendant respectfully refers to his answer to the eighth paragraph and repeats the same *mutatis mutandis* with respect to the publications of the "Arrow Library."

13. The defendants admit that the complainants for more than four years last past have been the publishers of certain books under the designation "The Columbia Library." The defendant denies, however, that such books so published have been or are now a periodical publication.

The defendant admits that the publication of such books was commenced on or about September 1, 1898, and, for aught anything the defendant knows to the contrary, one or more of said books has been issued every week since said date from the place of business of the complainants, and that each of said books has been exclusively in print, without addition by writing, mark or sign. The de-
18 fendant further admits that it has been the practice of the complainants to print in minute type in an unusual place on the back of the cover of each of said books, in a manner calculated to escape the notice of the public, a supposed date of issue, but the defendant avers, however, that the printing of such date is done as

a mere artificial, technical and formal compliance with the statutory requirement providing that the successive numbers of a periodical publication should bear a date of issue, and that the addition, in the manner above stated, of the date of issue, is intended to disguise the true character of each of said publications, which is that of a separate and independent book, and in aid of the original purpose of the complainants to simulate, for the purposes of postal rates, a periodical publication. The defendant admits that all of said books are numbered consecutively.

It is true that each and every of said books has been formed and composed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguished printed books for preservation from periodical publications.

The defendant denies that said books are originated and published for the dissemination of information of a public character; and while it may be true that each of said books may be a work of literature itself, the defendant denies that the said books or any of them, are devoted to literature in any proper or legal sense or within the meaning of the act of March 3, 1879. For aught anything this defendant knows to the contrary, none of the said books so issued was or is designed primarily for advertising purposes or for free circulation or for circulation at nominal rates.

The defendant does not know of his own knowledge and therefore can neither admit or deny that the said "Columbia Library" has a legitimate list of subscribers; but the defendant is informed and believes and therefore avers that none of the said several books or novels published under that designation are sent through the mails to individuals who subscribe for them for any period of time, but that all, or practically all, of the copies of each of the said books so published are turned over by the complainants to a book dealer or news agent who distributes them to other agents, who in turn sell them as books singly and without relation to the other books or novels likewise published under the same designation. And the defendant says that by reason of the manifest character of these publications as books, and not as successive parts of a continuous periodical publication, he was not, nor was his predecessor, ever called upon or required officially to determine whether or not the supposed periodical known as "The Columbia Library" had a legitimate list of subscribers; and he further submits that if the supposed right of the complainants to transmission of the books published under the designation of "The Columbia Library" is in anywise dependant upon the existence of a legitimate list of subscribers, the existence of such list is a matter of fact for the cognizance of the Postmaster General.

The defendant admits that each of the said books, consists
19 of a work of fiction, as to the literary merit of which, however, he submits that it is immaterial for him to make answer.

The defendant further says that each of the so-called issues or numbers of the "Columbia Library" is not an issue or a number of

a periodical publication, but is a separate and distinct book, complete in itself; and that the so-called issues have no true relation or connection one with another, and that the only connection between the successive books issued under this name consist in the mere fact that along with the real title of each of said books, on the cover thereof, the publisher has printed the additional words "Columbia Library," and that such books are given consecutive numbers. He further avers that said books are sold separately as books, complete in themselves, and are denominated "books" by the publisher thereof, as will appear by reference to the page immediately following the cover of a copy of one of said books entitled "Rube Burrow's League," by Marlin Manley and filed herewith as a part of this answer as Exhibit No. 3, as well as by reference to the circular and "gummed labels" issued by the complainants and filed herewith as Exhibit No. 10. The defendant further avers that the additional title "Columbia Library," and the giving of consecutive numbers to such books are a mere device by means whereof the complainants have endeavored to disguise the true character of said books and to give to them the appearance of a periodical publication, for the purpose of obtaining for them the rates of postage designed for periodical publications. And the defendant further avers that, stripped of its cover, no mark, sign or designation of any of the said books as an issue of a periodical publication appears thereon. The defendant further says that the publications issued by the complainants and marked upon the cover with the additional designation of the "Columbia Library" are books and mailable matter of the third class, and do not constitute a periodical publication, in confirmation whereof the defendant prays leave to refer to a copy of one of said publications hereinbefore designated as Exhibit No. 3.

The defendant admits the remaining allegations of the thirteenth paragraph as to the application for entry of the "Columbia Library" and the certificate issued thereon and the subsequent transmission of said publications through the mails.

14. The defendant admits the allegations of the fourteenth paragraph substantially as made, but for greater certainty prays leave to refer to his answer to the sixth paragraph, which, *mutatis mutandis*, he reaffirms as to the "Columbia Library."

15. The defendant admits the allegations of the fifteenth paragraph.

16. For answer to the sixteenth paragraph, the defendant refers to his answer to the eighth paragraph and affirms in respect of the "Columbia Library" *mutatis mutandis* what is there said with respect to the "Arrow Library."

17. The defendant admits that for more than four years last past the complainants have been the publishers of certain books under the various designations of "The Undine Library," "The Medal Library," "The Eagle Series," "The Bertha Clay Library," "The Diamond Hand-book Series," and "The Eden

Series," but he denies that the publications issued under these designations, or any of them, are a periodical publication.

18. He admits that the publication of the said books under the designation aforesaid was commenced in the various instances as stated in said paragraphs, and that for aught anything this defendant knows to the contrary such books published under the said designations have been issued at the intervals therein stated. He admits that all of said books have been issued from a known office of publication, to wit, the place of business of the complainants, and that each of said books has been exclusively in print without addition of writing, mark or sign, and that the publishers have been in the practice of printing upon the back cover of each of said publications a supposed date of issue for the purpose of simulating the character of a periodical publication in order to obtain postal rates for periodical publications; and that the books published under the several designations aforesaid have been given consecutive numbers.

The defendant admits that each of the books so published have been formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Defendant denies that said publications were originated and published for the dissemination of information of a public character. He further says that while it may be true that each of said books so published is literature in itself, he denies that the said books or any of them are devoted to literature in any legal or proper sense, or within the meaning of that term as used in the act of March 3, 1879. He admits that for aught anything this defendant knows to the contrary, none of said books so published was or is designed for advertising purposes, or for free circulation, or for circulation at nominal rates.

The defendant does not know of his own knowledge and therefore can neither admit nor deny that the divers books published under the several designations aforesaid and called by the publishers periodical publications, have had or now have a legitimate list of subscribers; but the defendant is informed and believes and avers that none of the said books published under the several designations aforesaid are sent through the mails to individuals who subscribe for the library under the name whereof such books are published, for a definite period of time, but that all, or practically all of the copies of each of said books so published are turned over by the complainants to a book dealer or news agent who distributes them to other agents, who in turn sell them to the public as books singly and without relation to the other books published under the same library designation, and without regard as to whether said books are parts of one or another of any of the several so-
21 called libraries aforesaid. Defendant further says that by reason of the manifest character of these publications of the complainants as books and of the finding and determination by his predecessor in office that they were in fact books and do not consti-

tute a periodical publication, he was not, nor was his predecessor in office, ever called upon or required officially to determine whether or not the supposed periodicals known by the several designations above mentioned had a legitimate list of subscribers. He further submits that if the supposed right claimed by the complainants to the transmission of such publications, under the several designations aforesaid, is in any wise dependant upon the existence of a legitimate list of subscribers to each one of the several libraries aforesaid, such questions are matters of fact for the cognizance and determination of the Postmaster General.

The defendant admits that the letter-press of each of the books embraced within the several designations aforesaid consists of fiction, but as to the literary merit thereof the defendant submits that it is not material for him to answer. But the defendant says that all of the publications issued under the several library designations aforesaid are separate and distinct books, complete and independent in themselves, and that they have no true relation or connection one with another and do not constitute a periodical publication or any periodical publication. He says that the only connection between the books published under any one of said library titles and to which successive numbers are given lies in the mere fact that along with the title of — particular book there is printed on the cover thereof the designation of "The Undine Library," "The Medal Library," "The Eagle Series," "The Bertha Clay Library," "The Diamond Handbook Series," and "The Eden Series," as the case may be, and that the books published under the several library or serial titles are given consecutive numbers. He further says that said books are sold separately as books, complete in themselves, and that the library titles aforesaid and the consecutive numbering are a mere device by which it is sought to disguise such books as periodical publications for the purpose of obtaining for them the postal rates provided for periodical publications. The defendant further says that none of the said books so published by the complainants constitute a periodical publication, and that the same are books and mailable matter of the third class. And the defendant prays leave to refer to copies of a publication under each of the several designations aforesaid filed herewith as a part of this answer and marked respectively Exhibits 4, 5, 6, 7, 8 and 9.

The defendant admits the remaining allegations of the eighteenth paragraph as to the divers applications for entry, and the admission and transmission of the publications aforesaid.

19. The defendant says that in pursuance of the power and duty imposed upon him by a law, his predecessor in the office of Postmaster General did, on or about September 28, 1901, in respect of "The Eagle Series" and on or about September 30, 1901, in respect of "The Diamond Handbook Series," and on or about October 3, 1901, in respect to "The Eden Series," "The Medal Library" 22 and "The Bertha Clay Library," and on or about October 12, 1901, in respect of "The Undine Library" caused the postmaster at the city of New York to notify the complainants that the

Post Office Department would afford them an opportunity to show couse why the publications published under each of the several designations aforesaid, should not be excluded from the second class rates of postage on the ground that they had the characteristics of books.

That in response to such notices to show cause, the complainants submitted arguments, statements and evidence for the purpose of establishing that the publications published under each of the several titles aforesaid were properly admissible to the second class of mail matter. That said arguments, statements and evidence were duly examined and considered by the Postmaster General acting through the Third Assistant Postmaster General in that behalf, and that as a result of such examination and consideration, upon the hearing of such notices to show cause, the Postmaster General acting through the Third Assistant Postmaster General in that behalf found and determined that the publications issued by the complainants under the several names aforesaid, and all and every of them, had not the characteristics of and were not in fact mailable matter of the second class under the provisions of the act of March 3, 1879, but on the contrary had the characteristics of and were in fact mailable matter of the third class, to-wit: books, and thereupon the Third Assistant Postmaster General acting for the Postmaster General in that behalf, under date of November 2, 1901, notified the postmaster at New York of the finding and determination aforesaid and directed the said postmaster to cancel the certificates of entry of the said several libraries and series aforesaid and to advise the complainants, the publishers of the same, that thereafter it would be unlawful to print on such publications a statement of entry to the second class, and that, when offered for mailing in the future, whether by the publishers, news agents, or others, such publications, all and every of them, would be subject to the third class rate of postage, one cent for each two ounces or fraction thereof, prepaid by stamps affixed, and thereupon the postmaster at New York addressed to the complainants the notices of cancelation of said privileges substantially as set forth in said bill.

And the defendant says that thereafter and up to the present time his predecessor as Postmaster General, and he, as Postmaster General, have refused, and he now continues to refuse to admit or to carry in the United States mail said publications, and all and every of them, at the said second-class rate, and from that time up to his retirement from office his predecessor, and he, since his accession to office, continues to demand postage upon the said publications at the third-class rate. The defendant says, however, that since the notice of exclusion of said publications from the second class rate and their relegation to the third class rate in November, 1901, no formal application for entry of said publications has again been made.

23 20. For answer to the twentieth paragraph, the defendant refers to his answer to the eighth paragraph and repeats and adopts the allegations there made in respect of the "Magnet De-

tective Library" *mutatis mutandis* in respect of "The Undine Library," "The Medal Library," "The Eagle Series," "The Bertha Clay Library," "The Diamond Handbook Series," and "The Eden Series."

21. The defendant says that no property rights were accorded to the complainants by the certificates of entry aforesaid, and he denies that there is any right, whether of property or otherwise, to the continuance of the certificates of entry issued in the case of the several publications aforesaid, and he avers that the said certificates were, in each of said cases, mere licenses, vesting no right, title or interest whatsoever.

22. Defendant denies that in the publication and issue of the books to which the additional library titles have been given as aforesaid, the complainants have complied with all the terms conditions and requirements of the laws of the United States relating to the second class of mailable matter; he says, on the contrary, that the said publications and all and every of them, are books and mailable matter of the third class.

Answering generally to the whole bill, the defendant says that he, as Postmaster General of the United States, is, and his predecessor in that office was, charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service; that among such duties is that of classifying the mail matter offered for transmission through the United States mails and distributing the same into the respective classes created and designated by Congress; in course of which classification it becomes incumbent upon him and it became incumbent upon his predecessor, to investigate and ascertain whether matter offered for transmission as second class matter does or does not comply with the conditions upon which the law permits publications to be admitted to the second class rates, and whether such matter is in fact second class mail matter or matter of some other c' that such investigation, exercised by the Postmaster General for t. ime being, as the head of an executive department, in the ordinary discharge of his duties, requires an inquiry into facts, an examination of evidence and the application of the law to the facts; that in the case of the publications hereinbefore mentioned, after an inquiry into the facts relevant and material, an examination of the evidence, and an interpretation of the law and an application thereof to the facts, his predecessor in the office of Postmaster General, found and determined that said publication had not the statutory characteristics of the second class of mail matter, but on the contrary the characteristics of the third class of mail matter, and did not fulfil the conditions established by law for second class matter, and were not in fact second class matter but third class matter, and accordingly held and determined that the said publications were
24 not entitled to admission to the mails as second class matter and that the certificates permitting such admission should for that reason be revoked and become inoperative in the future, which said finding, determination and decision, involved the exer-

cise of judgment and discretion on the part of the then Postmaster General and of the Third Assistant Postmaster General acting in that behalf, and for that reason, as this defendant respectfully submits, is not subject to be reviewed by this honorable court.

And this defendant says that he has not reversed or set aside the decision of his predecessor as to the character of the said publications or as to their classification as mailable matter of the third and not of the second class. And the defendant further says that he knows of no fact, circumstances or thing whatsoever, tending to show that the finding and determination of his predecessor, the Postmaster General, was erroneous, but on the contrary this defendant, upon an examination of the facts as to the said publications, has reached the same finding and conclusion, and he says that the said publications are in fact books and mailable matter of the third class.

Defendant is further advised, and so believing avers that the privilege of having publications which comply with the conditions of second class matter, as defined in the act of March 3, 1879, transmitted at the second class rate is not a property right; and that whether publications do so comply with such conditions is a matter wholly within the competence and jurisdiction of the Postmaster General, and the determination of which is within the judgment and discretion of the Postmaster General for the time being.

And the defendant respectfully submits that complainants in and by their said bill and the matters and things set forth therein does not make or state such a cause as would entitled the complainants to the relief thereby prayed; and as to so much of the said bill as prays an injunction against the enforcement by this defendant of the decision of his predecessor that the said publications are not entitled to transmission at the second class rates, this defendant submits that it is against the course and practice and not within the jurisdiction of this court to interfere with, review, or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion, or to require the Postmaster General, as an executive officer, to perform a supposed duty in the admission of mailable matter by an injunction forbidding him to refuse to perform said duty, in which respect the defendant respectfully submits that the complainants have a plain, adequate and complete remedy at law by writ of mandamus.

And defendant hopes he will have the same benefit of these defenses as if he had formally demurred to the said bill upon
25 the ground thereof. And having fully answered the defendant prays to be hence dismissed with his reasonable costs.

HENRY C. PAYNE,
Postmaster-General.

H. M. B.
HENRY H. GLASSIE,
Special Assistant to the Attorney-General,
Solicitors for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

Henry C. Payne, Postmaster General, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the matters and things therein set forth he knows to be true, save those stated upon information and belief, which he believes to be true.

HENRY C. PAYNE,
Postmaster-General.

Subscribed and sworn to before me this 12th day of June, 1903.

THOS. E. ROACH,
[SEAL.] *Notary Public, District of Columbia.*

Order Denying Preliminary Injunction, &c.

Filed June 15, 1903.

In the Supreme Court of the District of Columbia.

ORMOND G. SMITH ET AL.
vs.
HENRY C. PAYNE, Postmaster-General. } Eq. 23996.

This cause coming on to be heard upon the rule to show cause why an injunction *pendente lite*, should not be granted, it is, this fifteenth day of June, 1903, upon consideration of the bill with the exhibits thereto and the answer of the defendant with the exhibits thereto, adjudged and ordered by the court, and the authority thereof, that the prayers of the bill for a preliminary injunction be, and the same is hereby, denied and the rule to show cause be, and the same is hereby, discharged with costs of same.

THOS. H. ANDERSON,
Associate Justice.

26 *Replication.*

Filed June 29, 1903.

In the Supreme Court of the District of Columbia, Holding Equity Court.

ORMOND G. SMITH ET AL.
vs.
HENRY C. PAYNE, Postmaster-General. } Equity. No. 23996.

The complainants hereby join issue upon the answer of the defendant and will hear the cause on bill and answer against the defendant.

T. L. JEFFORDS,
Solicitor for the Complainants.

Stipulation.

Filed July 7, 1903.

In the Supreme Court of the District of Columbia, Holding Equity Court.

SMITH ET AL.
vs.
HENRY C. PAYNE, Postmaster General. } Equity. No. 23996.

It is hereby stipulated by and between the solicitors for the respective parties that reference may be made at any hearing of this cause to all or any of the issues of the complainants published under the designation of The Magnet Detective Library, The Arrow Library, The Columbia Library, The Undine Library, The Medal Library, The Eagle Series, The Bertha Clay Library, The Diamond Handbook Series and The Eden Series prior to and including the dates of the cancellation of the certificates of entry as second class mail matter respectively, and further that the cause may be heard at this term.

July 7, 1903.

TRACY L. JEFFORDS,
Solicitor for Complainants.
HENRY H. GLASSIE,
Solicitor for Defendant.

27 *Decree.*

Filed July 7, 1903.

In the Supreme Court of the District of Columbia, Holding Equity Court.

ORMOND G. SMITH ET AL.
vs.
HENRY C. PAYNE, Postmaster General. } Equity. No. 23996.

This cause coming on to be heard upon the bill and the exhibits filed therewith and the answer and exhibits filed thereto and the proceedings had therein, on consideration thereof it is this 7th day of July, 1903, by the court:

Adjudged, ordered and decreed that the bill herein be and the same is hereby dismissed, with costs to the defendant.

THOS. H. ANDERSON, *Justice.*

Notice of appeal given in open court and deposit of one hundred dollars in lieu of bond for costs may be made with clerk of this court.

THOS. H. ANDERSON, *Justice.*

Memorandum.

July 9, 1903.—$100.00 deposited by appellant in lieu of appeal bond.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 47, inclusive, and 19 books marked, respectively, Complainants' Exhibits Nos. 1 to 9, inclusive, and Defendant's Exhibits Nos. 1 to 10, inclusive, transmitted herewith, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 23,996, in equity, wherein Ormond G. Smith *et al.* are complainants, and Henry C. Payne, Postmaster General, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25 day of July, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

28 Court of Appeals, District of Columbia, April Term, 1903.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. Gould, Composing the Firm of Street & Smith, Appellants,

vs.

HENRY C. PAYNE, Postmaster General, Appellee. } No. 1354.

Stipulation.

It is hereby stipulated by and between counsel for the respective parties that the copies of the original exhibits certified with the transcript of the record, to wit, Appellants' Exhibits Nos. 1 to 9, inclusive, and Appellee's Exhibits Nos. 1 to 10, inclusive, may be used at the hearing of the cause, examined by the court and the printing thereof dispensed with.

TRACY L. JEFFORDS,
Solicitor for Appellants.
HENRY H. GLASSIE,
Solicitor for Appellee.

(Endorsed:) No. 1354. Court of Appeals, District of Columbia April term, 1903. Ormond G. Smith *et al. vs.* Henry C. Payne Postmaster General. Stipulation as to dispensing with printing of exhibits. Court of Appeals, District of Columbia. Filed Jul- 27, 1903. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1354. Ormond G. Smith *et al.*, appellants, *vs.* Henry C. Payne, Postmaster General. Court of Appeals, District of Columbia. Filed Jul- 27, 1903. Robert Willett, clerk.

29 Court of Appeals, District of Columbia.

ORMOND G. SMITH, GEORGE C. SMITH, and Cora A. Gould, Composing the Firm of Street & Smith, Appellants,
vs.
HENRY C. PAYNE, Postmaster General.
} No. 1354. October Term, 1903.

Stipulation.

Counsel for appellants and appellee herein, considering this case, controlled in this court by its opinion in the Houghton case, No. 1303, decided June 5, 1903, stipulate and agree to submit this cause, with leave of court, on the printed record. Such submission, however, not to affect the rights of appellants or parties hereto to appeal to the United States Supreme Court from the decree which may be rendered herein by this court

October 12, 1903.

TRACY L. JEFFORDS,
Counsel for Appellants.
HENRY H. GLASSIE,
Counsel for Appellee.

(Endorsed:) No. 1354. Oct. term, 1903. Ormond G. Smith *et al. vs.* Henry C. Payne. Stipulation. Court of Appeals, District of Columbia. Filed Oct. 13, 1903. Robert Willett, clerk.

30 WEDNESDAY, *October 14th, A. D.* 1903.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. Gould, Composing the Firm of Street & Smith, Appellants,
vs.
HENRY C. PAYNE, Postmaster General.
} No. 1354.

The above entitled cause was submitted to the consideration of the court on the printed record filed herein per stipulation of counsel.

31 ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. Gould, Composing the Firm of Street & Smith, *vs.* HENRY C. PAYNE, Postmaster General. } No. 1354.

(Mr. Chief Justice ALVEY delivered the opinion of the court.)

This case has been submitted on the record, by agreement of counsel, without briefs or argument, because as stated in the stipulation, counsel consider and concede that the case is not different or distinguishable from that of *Houghton and others against Payne, the Postmaster-General*, decided by this court at the last April term thereof, and which decision must, if adhered to by this court, control the decision of the present case, so far as this court is concerned. An appeal from that decision has been taken to the Supreme Court of the United States; but we adhere to that opinion until reversed; and as it is conceded that the present is not distinguishable from that case, we must affirm the order appealed from, on the authority of Houghton and others against Payne; *and it is so ordered. Order affirmed.*

32 THURSDAY, *October 15th, A. D.* 1903.

ORMOND G. SMITH, GEORGE C. SMITH, and Cora A. Gould, Composing the Firm of Street & Smith, Appellants, *vs.* HENRY C. PAYNE, Postmaster General. } No. 1354. October Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

October 15, 1903.

33 WEDNESDAY, *November 4th, A. D.* 1903.

ORMOND G. SMITH, GEORGE C. SMITH, and CORA A. Gould, Composing the Firm of Street & Smith, Appellants, *vs.* HENRY C. PAYNE, Postmaster General. } No. 1354.

On motion of Mr. Tracy L. Jeffords, of counsel for the appellants in the above entitled cause, it is ordered by the court that said ap-

pellants be allowed an appeal to the Supreme Court of the United States, and it is further ordered that said appellants deposit with the clerk the sum of one hundred dollars for costs in lieu of bond.

MEMORANDUM.—Nov. 11, 1903. $100.00 deposited for costs on appeal to Supreme Court U. S. in lieu of bond.

34 UNITED STATES OF AMERICA, *ss:*

To Henry C. Payne, Postmaster General, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Ormond G. Smith, George C. Smith and Cora A. Gould, composing the firm of Street & Smith, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of November, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service of above citation acknowledged Nov. 12, 1903.

HENRY H. GLASSIE,
Attorney for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 12 1903 Robert Willett clerk.

35 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 34 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Ormond G. Smith, George C. Smith and Cora A. Gould, composing the firm of Street & Smith, appellants, *vs.* Henry C. Payne, Postmaster General, No. 1354, October term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 14th day of November A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,132. District of Columbia Court of Appeals. Term No. 481. Ormond G. Smith, George C. Smith, and Cora A. Gould, composing the firm of Street & Smith, appellants, *vs.* Henry C. Payne, Postmaster General. Filed November 14", 1903. File No. 19,132.